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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~111~~ 119.

THE WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES E. HUGHES.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED SEPTEMBER 29, 1905.

(19,913.)

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1 In the Supreme Court of Appeals of Virginia, at Richmond.

WESTERN UNION TELEGRAPH COMPANY
vs.
HUGHES.

To the honorable judges of the supreme court of appeals of Virginia:

The petition of the Western Union Telegraph Company respectfully shows unto this honorable court that the petitioner is aggrieved by the judgment entered in the corporation court of Danville, Virginia, on January 9, 1904, during the January term of said court, in the action at law wherein C. E. Hughes was plaintiff and your petitioner was the defendant, and in which action the said plaintiff was seeking to recover against the defendant the penalty of one hundred dollars ($100) imposed by sections 1291 and 1292 of the Code of Virginia of 1887, prescribing a penalty for the failure to transmit and deliver dispatches in the manner and time as set forth in said sections. The case was duly matured at rules, and came on for trial at the said January 1904 term of the court, and the court on the day and year first aforesaid rendered a judgment against the defendant company for the penalty of one hundred dollars ($100) and interest thereon from the day the judgment was rendered, and costs to the plaintiff. The case was heard on the declaration of the plaintiff and the demurrer and *nil debit* of the defendant and the facts certified, as the record presented with this petition will show. The facts were agreed between the parties, and the whole case upon the pleadings and the agreed facts was submitted to the judge of the corporation court for consideration and decision. The telegram upon which the action was founded and which was copied into the declaration, omitting the printed matter on the telegraph blank, is as fol-
2 lows, and was directed from Danville, Virginia, to Pocahontas, Virginia, on the 2nd day of November, 1903.

NOVEMBER 2, 1903.

Miss Isabelle Malone, Pocahontas, Va., care Pocahontas inn.

Mother taken sick Saturday night, am afraid fatal attack, wrote you yesterday, come if can.

C. E. HUGHES.

At the trial of this action the agreed facts as certified by the judge are as follows:

1. That the message from Danville, Virginia, to Pocahontas, Virginia, was delivered to the defendant company at Danville, Virginia, at 8 o'clock a. m., on November 2, 1903.

2. That it was sent to and received at Richmond, Virginia, at 8.20 o'clock a. m., on November 2, 1903.

3. That it was sent from Richmond to Bluefield, West Virginia, and was received at Bluefield, West Virginia, at 9.05 a. m., on the said 2nd day of November 1903.

4. That the message was never received at Pocahontas, and was never delivered to the sendee, Miss Isabelle Malone, at Pocahontas inn, Pocahontas, Virginia, or to any one for her, or to her at any other place, but it was sent by the only possible route, from Danville, Va., to Pocahontas, Va., that is by Bluefield, West Virginia.

5. That the plaintiff, C. E. Hughes, had an account with T. P. Kinney, the agent of the defendant company at Danville, Virginia, that telegrams sent by the said Hughes should be charged to him on said account, and although the said Hughes did not pay for the said telegram at the time of delivery at Danville, Virginia, yet it was charged in said account and was afterwards paid for by said Hughes before this action was brought. The defendant contended that under the penal statute, the failure to pay for the message in cash defeated the action. The plaintiff contended before the judge of the court who tried the case that the case was ruled by the
3 case of The Western Union Telegraph Company vs. Reynolds, decided by this court June 19, 1902, and the defendant company contended that the case should be ruled by the case of Hanley vs. Kansas City Southern Ry. Co. 187 U. S. p. 617, decided January 5, 1903. The Reynolds case was dismissed for want of jurisdiction, because the amount involved was not large enough to give jurisdiction to this court, but the case discusses other matters and refers to the case of The Lehigh Valley R. Co. vs. Pennsylvania 145 U. S., 192, and of this we shall have more to say further on in this petition.

The Reynolds case was decided under the old constitution, which in article VI, sec. 2, says, of the court of appeals:

"It shall have appellate jurisdiction in civil cases except in cases of *habeas corpus*, mandamus and prohibition. It shall not have jurisdiction in civil cases where the matter in controversy exclusive—costs is less in value or amount than five hundred dollars ($500), except in controversies concerning the title or boundaries of land, the probate of a will, the appointment or qualification of a personal representative, guardian, committee or curator, or concerning a mill, roadway, ferry or landing, or the right of the corporation or the county to levy tolls or taxes, and except in cases of *habeas corpus*, mandamus and prohibition or the constitutionality of a law."

And by section 3455 of the Code of Virginia of 1887, there is added to the grounds of appeals "or some matter not merely pecuniary."

This court has held that the meaning of the words "not merely pecuniary," apply only to such matters as are specified in the constitution and this ruling we think needs no citation of authority, but we cite 93 Va., p. 16, Price vs. Smith.

The present constitution of Virginia, which went into effect July 10th, 1902, is the law of the State under which this case was tried and under art. VI, sec. 88, 2nd paragraph, this provision for the

court of appeals is made: "subject to such reasonable rules as may be prescribed by law as to the course of appeal, the limitation as to time, the security required, if any, the granting or refusing of appeals, and the procedure therein, it shall, by virtue of this constitution, have appellate jurisdiction in all cases involving the constitutionality of a law as being repugnant to the constitution of this State or of the United States, or involving the life or liberty of any person."

So it will be perceived that the matter of the constitutionality as referred to the Constitution of the United States, of any law,
4 was not granted in terms in the old constitution, but is granted in the one under which we now live, and the petitioner contends now as he contended before the judge of the corporation court, that the agreed facts of the case under the authority of the Hanley case, above cited, raised the constitutionality of sections 1291 and 1292 of the Virginia Code, and said sections should by the court have been held unconstitutional, and therefore a judgment for the defendant should have been rendered.

This court in the case of The Board of Supervisors vs. Catlett's Ex'ors, 86 Virginia, 158, decided:

"Where the case is presented here on the same record of pleadings and exhibits as was presented in the court below this court can adjudge the case on its merits, though no exceptions were taken to the action of the court below."

The court will observe from the record with this petition that no exceptions were taken during the term of the court, but it may be noted in passing that that fact came about because the clerk of the court, to whom the exceptions in writing were handed, and he was asked to hand them to the court when the judge came in, was taken sick and left his office and forgot to give the exceptions to the judge, but after the term of the court and within the limitation of thirty days prescribed by the Acts of Assembly of February 15, 1901 (extra session 1901, p. 186, amending section 3385), the appellant did present and have signed the bill of exceptions now with this record and the certificate of the facts of the case, as to which there was no dispute, as they were agreed as aforesaid. This, we contend, brings us clearly within the protection of The Board of Supervisors vs. Catlett's Ex'ors, just above referred to. This case, it will be observed, was submitted to the judge on the pleadings and facts (not evidence), and there was nothing for the judge to do but to pass upon the law that applied to that state of facts.

In the case of Cheatham vs. Cheatham and others, 30 Grattan, 56, Judge Staples decided:

"Where the whole matter of law and fact is submitted to the court below and its decision is based upon the mere *credibility* of witnesses, it will not be *distributed* by the appellate court unless palpably wrong."

This case is referred to in the case of Smith vs. Hutchinson and

others, 75 Virginia, p. 690, and in the latter case the court quotes the language of Judge Staples in the Cheatham case, and adds:

5 "But this principle is not applicable in a case where the decision of the lower court proceeds, not upon the *credit* to be given to witnesses, but upon the *rule of law* supposed by it to be correct, but in fact erroneous."

The petitioner has always understood that there is no difference in principle or in practice between a demurrer to evidence upon agreed facts and the submission of the whole case, both law and fact, to the judge for decision. The counsel for the appellant can certainly think of no reason why there should be any difference. The judge has nothing to do but apply the law to the facts, and there is surely no reason why he should be asked after he has given the judgment to set aside the very thing he has just done. It is certainly fair to presume that he would do again what under careful consideration of everything before him he has just done. It would almost be contempt to ask him to do so. In the case of the Norfolk and Western Ry. Co. vs. Dunnaway's Administrator, 93 Virginia 29, the court says: "It is not necessary for a motion for a new trial to be made in the trial court in order to have a judgment on a demurrer to evidence reviewed in the appellate court;" and in the same report on page 138 the court says: "Upon a demurrer to the evidence it is not necessary to move for a new trial in the trial court in order to review the judgment in the appellate court."

See also Ruble vs. Seab. Ry., decided Jan. 21, 1904.

So it seems clear to the counsel for this petitioner that in the case now presented to your honors, it was not and is not necessary to ask for the bill of exceptions, but they did — the precaution, both during the term of the court, which went awry by fault of the clerk, and again within the thirty-day limitation herein above referred to, and therefore they think they are properly before this court with this petition and record.

We come now to call the court's attention to the only two cases which were used in the court below in the argument of this case. The plaintiff relied on the Reynolds case, 100th Virginia, above referred to, and the defendant relied on the Hanley case, 187 U. S., also above referred to, and the court of a necessity must have followed the ruling in the Reynolds case, decided under the old constitution and before the Hanley case had been decided, because had it followed the Hanley decision, there would of necessity have been a judgment for the defendant company.

As above stated the Reynolds case cited as authority The Lehigh Valley R. Co. vs. Pennsylvania, 145 U. S. 192, and that case held that transportation from one point in a State to another point

6 in the same State, although the railroad line looped out of the State into another State, and back into the original State, thus having the initial point and the final point in the same State,

but the loop in a foreign State, did not impress the transportation with the character of inter-state commerce.

Your petitioner contended before the court that at the time of the decision of the Reynolds case under the ruling of the Lehigh Valley R. R. case, the propositions therein made by the learned judge, might have been correct, but that the Hanley case, decided seven or eight months after the Reynolds case, made a new rule of law about the road looping out of and back into the same State, and in effect overruled the Lehigh Valley case, and the case based on it.

The court will please observe before we commence to quote from the Hanley case that in the second line of the syllabus the word "Arkansas" ought to be in the place of the word directly after "*Grannis*," which word is, as we can best read now through the ink correction which we have made in our volume "*Kansas*." The correction will readily be made by reference to the last two words in the fifth line from the bottom and the first word in the fourth line from the bottom on p. 618. Grannis is in Ark., not in Kansas. In this case Mr. Justice Holmes in delivering the opinion of the court quoted from Mr. Justice Field in the case of Pacific Coast &c., vs. R. R. Coms., 9 Sawr. 253, and the language quoted is as follows:

"To bring the transportation within the control of the State, as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the State."

9 Sawyer, 258.

And a little further on in the same case, Justice Holmes refers to the Lehigh Valley case, and says that the cases above cited, contrary to the law just quoted, were "decisions made simply out of deference to the conclusions drawn from Lehigh Valley R. Co. vs. Pennsylvania, 145 U. S., 192, and we are of opinion that they carry their conclusions too far.

That was the case of a tax and was distinguished expressly from an attempt by a State directly to regulate the transportation while outside its borders.

145 U. S., 204.

7 And although it was intimated that for the purposes before the court, to some extent commerce by transportation might have its character fixed by the relation between the two ends of the transit, the intimation was carefully confined to those purposes. Moreover, the tax "was determined in respect of receipts for the proportion of the transportation within the State." Such a proportioned tax had been sustained in the case of commerce admitted to be interstate.

142 U. S., 217.

Whereas it is decided, as we have said, that when a rate is established it must be established as a whole. We are of the opinion that the language we have quoted from Mr. Justice Field is correct, and that the decree of the circuit court should be affirmed."

It is true that the Hanley case on page 619 does say: "We may as well add in this connection that the present railroad gets the authority for its line in the Indian Territory, through a predecessor in title from an act of Congress 1893, c. 169, 27 Stat. 487, and that by that act Congress 'reserves the right to regulate the charges for freight and passengers on said railroad until a State government shall be authorized to fix and regulate the cost,' etc., but Congress expressly reserves the right to fix and regulate at all times the cost of such transportation by said railroad or said company whenever such transportation shall extend from one State into another, or shall extend into more than one State." So it may be contended that this particular case makes the transportation on that particular road subject to the law of Congress, but in reply to that it may be observed that Congress can certainly not regulate or manage interstate commerce any further or any more positively by a *special act* than the Constitution of the United States *orders* and directs it to do when in article I., section 7, sub-divs. 3, it gives Congress exclusive right "to regulate commerce with foreign nations and among the several States and with the Indian tribes."

This we believe is the correct quotation from the Constitution of the United States where it confers the powers upon Congress; and Congress in granting privileges, or making regulations for railroad companies within the Territories certainly could not go beyond the limitations of the Constitution, and it is therefore submitted that the Hanley case is the same in legal effect as it would have been had the last quotation from it not been incorporated in the case.

With this statement of the law and facts, as understood by the petitioner, it is humbly submitted that the telegram delivered to be sent from Danville, Va., to Pocahontas, Va., to a company whose
8 only possible and proper route was to send it by Richmond, Va., and from Richmond, Va., to Bluefield, West Va., and from Bluefield, West Va., to Pocahontas in Virginia again, and the message was lost at Bluefield, West Va., outside of the State of the sending and receiving points, under the ruling in the Hanley case; stamps the transmission with the character of interstate commerce, and therefore sections 1291 and 1292 of the Virginia Code, seeking to regulate such transportation is contrary to the Constitution of the United States, which commits this matter to the hands of Congress, and therefore this case now presented to the court ought to have been decided by the lower court in favor of the defendant company.

Upon the facts herein above stated and under the law, as your petitioner is advised the law is, in such a case, your petitioner assigns the following errors as committed and done by the corporation court of Danville, Virginia, in rendering the judgment herein above complained of.

1. The said court erred in not holding that the usual charges for the telegram sent by Hughes had not been paid by him as required by law, and therefore judgment should have been rendered for the defendant company.

2. The said court erred in not holding that the transmission of the said message from Danville, Virginia, to Pocahontas, Virginia, by Bluefield, West Virginia, where it was lost, was interstate commerce, and therefore the sections herein above referred to were repugnant to the Constitution of the United States, and on that ground judgment should have been rendered for the defendant company. The defendant company therefore humbly prays that your honors will grant a writ of error and supersedeas to the judgment aforesaid, and that the same may be reviewed and reversed by this court. And as in duty bound your petitioner will ever pray, etc.

BERKELEY & HARRISON,
Attorneys for Petitioner.

I, L. C. Berkeley, Jr., a counsel, practicing in the supreme court of appeals of Virginia, do hereby certify that, in my opinion, the judgment of the corporation court of Danville, Va., set forth in the record presented with this petition, should be reviewed by the supreme court of appeals of Virginia.

L. C. BE-KELEY, JR.

9 MEMO.—The judgment is only for $100 and interest and costs and therefore the supersedeas bond need not be more than $150.

BERKELEY & HARRISON.

Returned to me February 15, 1904.

H. STEWART JONES, C. C.

Pleas Before the Judge of the Corporation Court of Danville, at the Courthouse Thereof, on the 9th Day of January, 1904.

Be it remembered that heretofore, to-wit: on the 10th day of November, 1903, came C. E. Hughes, by his attorney and sued out of the clerk's office of said court a summons against the Western Union Telegraph Company, a corporation, which summons with the return thereon, is in the following words and figures to-wit:

"Summons."

The Commonwealth of Virginia to the sergeant of the city Danville, Greeting:

We command you to summon the Western Union Telegraph Company, a corporation, if it be found in your bailiwick, to appear at the rules to be held in the clerk's office of the corporation court of Danville, on the first Monday in December, 1903, to answer C. E. Hughes, of a plea of debt for $100 and have then there this writ.

Witness, John R. Cook, clerk of our said court, at the courthouse thereof, this 10th day of November, 1903, and in the 128th year of the Commonwealth.

JOHN R. COOK, Clerk.

"Return."

Not finding the president, or any other person in the city of Danville, Virginia, upon whom this process can be served under
10 section 3225 Code of Virginia, 1887, except T. P. Kinney, manager of the Western Union Telegraph Company at Danville, Virginia. I delivered said Kinney, manager as aforesaid, a true copy of the within summons on the 10th day of November, 1903, within the city of Danville, Virginia, where said Kinney resides, within my bail-wick.

Fee 50 cents.

P. H. BOISSEAU, Sergeant.

And at another day to-wit: at rules held in the clerk's office of the corporation court of Danville, on the first Monday in December, 1903, came the plaintiff, by his attorney and filed his declaration against the said defendant, which declaration, is in the following words and figures, to-wit:

"Declaration."

In the Corporation Court of the City of Danville, Virginia.

C. E. Hughes, complainant, complains of The Western Union Telegraph Company, defendant, a corporation duly chartered and doing business as a telegraph company, in the State of Virginia, of a plea, that it render unto the said plaintiff the sum of one hundred dollars ($100), which it owes to and unjustly detains from him, for this, to-wit: That the plaintiff, who resides in the city of Danville, Virginia, on the 2nd day of November, 1903, at 8 o'clock a. m. of that day, then and there delivered to the said defendant company, a corporation doing business in the State of Virginia, a message in the following words and figures, to-wit: "November 2nd, 1903. Miss Isabelle Malone, Pocahontas, Va., care Pocahontas inn. Mother taken sick Saturday night, am afraid fatal attack, wrote yesterday, come if can. C. E. Hughes." Said message was to be transmitted by the said defendant to the said town of Pocahontas over its own lines, and to be delivered to the said Miss Isabelle Malone, who was at that time living at Pocahontas inn, at Pocahontas, Va.

That the said message was duly received by said defendant company, on the 2nd day of November, 1903, at 8 o'clock, a. m., to wit: in the city of Danville, Va., and all charges for sending and delivering the said message at its place of designation according to the regulations of the said defendant company were then and there prepaid by the said plaintiff to the said defendant company, and the plaintiff avers that it was the duty of the said
11 defendant company, then and there to faithfully, impartially and promptly send and deliver the said message to the said

Miss Isabelle Malone, at Pocahontas inn, Pocahontas, Va. And the *the* said plaintiff avers that the said defendant company received the said message and undertook and agreed to transmit the same faithfully, impartially and as promptly as practicable, to the said Miss Is-belle Malone, at Pocahontas inn, in Pocahontas, Va. The payment of the usual charges therefor according to the regulations of the said company had been made to the said company as aforesaid, and the plaintiff avers that it was the duty of the said defendant company to transmit the said message faithfully, impartially and as promptly as practical to the said Miss Isabelle Malone, at Pocahontas inn, Pocahontas, Virginia. Yet the said plaintiff avers that the said defendant company wholly failed to discharge its duty in this regard to the plaintiff, and did not faithfully and impartially and as promptly as practicable transmit the said message to the said Miss Isabelle Malone, at Pocahontas inn, Pocahontas, Va., and in consequence of the said breach of duty on its part and of its failure so transmit faithfully, impartially and promptly as practical the said message *of* the said defendant company, under the statutes in such case made and provided, became indebted to the said plaintiff in the sum of one hundred dollars ($100), to be paid to the plaintiff whenever the said *defendant* should thereunto after request.

The said C. E. Hughes further complains of the said Western Union Telegraph Company, of a plea that it render unto him the sum of one hundred dollars ($100) which it owes to him and unjustly detains from him, for this, towit: That at the time of, and before the action herein stated arose the said defendant was a duly chartered telegraph company, doing business in this State, with the duty imposed upon it by the law of receiving and transmitting dispatches promptly as directed, and upon the arrival of a dispatch at the point to which it was to be transmitted, to cause the same to be forwarded to the person to whom the same was addressed, or his agent, and upon the payment of the charges due on such dispatch to deliver it promptly to the person to whom it was addressed, provided such person resided within the city or corporate town of which such station was, or that at such point the regulations of the said company require such delivery. The plaintiff avers that on November 2, 1903, *that* he wrote the following dispatch:

"November 2, 1903, Miss Isabelle Malone, Pocahontas, Va., c-o Pocahontas inn. Mother taken sick Saturday night; am afraid fatal attack, wrote yesterday; come if can. C. E. Hughes."

12 That he carried this dispatch to the defendant company in the city of Danville, Virginia, and delivered the same to the agent of said company, and paid all charges required by the said company for receiving, transmitting and delivering the said dispatch to Miss Isabelle Malone, Pocahontas, Va., c-o Pocahontas inn, at which point the regulations of the company required dispatches to be promptly delivered to the person to whom it was addressed, the said place of delivery being within an incorporated town, in which the defendant's station was. That the said dispatch

did arrive at said place of delivery, to wit: at the town of Pocahontas, Va., and when the same did arrive, the said defendant company failed and refused to deliver said dispatch to said Miss Isabelle Malone, at Pocahontas inn, Pocahontas, Va., as promptly as practicable, but held the same, and did not deliver it at all, and the plaintiff avers, that the defendant knew the contents of this dispatch, and knew that the occasion of sending the same would be defeated unless promptly delivered when received, and so the plaintiff avers, that by reason of the failure of the defendant to deliver the aforesaid dispatch as promptly as practicable, the said defendant company became indebted under the statutes in such case made and provided to the plaintiff, and has forfeited to the said plaintiff the sum of $100, to be paid to the plaintiff whenever the said defendant company should be thereunto afterwards requested. Yet the said defendant, although often requested, has not yet paid to the plaintiff the said sum of $100, as above demanded, or any part thereof, but to pay the same has hitherto wholly failed and refused, and still doth refuse, although the said plaintiff, according to the regulations of the said company, did present the claim in writing within 60 days to said company, after the said message was filed with the company for transmission, to the damage of the said plaintiff $100, and therefore he brings his *brings his* suit.

THOS. HAMLIN, *f. c.*

Whereupon the said defendant being duly summoned, and not appearing, on motion of the plaintiff it is ordered that judgment be entered for the plaintiff against the said defendant for the debt in the declaration mentioned, unless the said defendant shall appear and plead to issue at the next rules.

And at another day, to wit: at rules held in the clerk's office of the corporation court of Danville on the third Monday in December, 1903.

13 This day came the parties, their attorneys, thereupon the said defendant filed a written demurrer to the plaintiff's declaration, and the plaintiff joined therein, and at the same time filed a written plea of *nil debit* to said declaration.

And of this it puts itself upon the country and the plaintiff doth the like.

"Written Demurrer of Defendant."

Second Rules in December, 1903.

CHARLES E. HUGHES
against
WESTERN UNION TELEGRAPH CO.

Demurrer to Declaration.

The said defendant company comes and says that the declaration is not sufficient in law, and therefore the said defendant company demurs to the said declaration, and to each and every count thereof.

BERKELEY & HARRISON,
Attorneys, *p. d.*

Danville, Va., Dec. 17, 1903.

"Written Plea of *Nil Debit* of Defendant."

Second Rules in December, 1903.

CHARLES E. HUGHES
against
WESTERN UNION TELEGRAPH CO.

Plea of *Nil Debit.*

And the said defendant company, by its attorneys, comes and says that it does not owe the said sum of one hundred dollars, ($100) or any part thereof, in manner and form as the said plaintiff hath in his declaration above thereof complained.

14 And of this the said defendant company puts itself upon the country.

BERKELEY & HARRISON,
Attorney-, *p. d.*

Danville, Va., December 17, 1903.

And now at this day, to-wit: at a corporation court of Danville, held at the courthouse thereof on the 9th day of January, 1904, being the day and year first herein mentioned.

This day came the parties by their attorneys, thereupon the defendant's demurrer to the plaintiff's declaration having been considered by the court, is overruled, and neither party desiring a jury the court proceeded in lieu of a jury to try the matter in controversy, and issue joined, and having heard the evidence adduced, finds for the plaintiff, and gives judgment in his favor for the amount claimed in the declaration and the costs.

Therefore it is considered by the court that the plaintiff recover against the defendant one hundred dollars, with interest thereon from today, to-wit: the 9th day of January, 1904, at the rate of six

per centum per annum, till payment, the debt and interest aforesaid, and his costs by him about his suit in this behalf expended.

And at another day to-wit: at the same court continued and held at the courthouse thereof on the 19th day of January, 1904.

This day came again the parties by their attorneys, and the defendant intimating to the court its intention to apply to the supreme court of appeals of Virginia, for a writ of error and supersedeas to the judgment rendered in this cause, at a former day of this term, it is therefore ordered that said judgment be suspended for sixty days, upon the said defendant or some one for it, executing before the clerk of this court bond with approved security in the penalty of $150 payable and conditioned according to law.

And at another day, to-wit, at a corporation court of Danville, continued and held at the courthouse thereof on Tuesday the 2nd day of February, 1904.

This day came again the parties by their attorneys, and the defendant having excepted to opinions of the court given upon
15 the trial of this cause and this day tendered its bill of exceptions and certificate of facts, which were severally received, signed and sealed by the court, and ordered to be made a part of the record in this cause.

"Bill of Exceptions."

In the Corporation Court of Danville, Va.

C. E. HUGHES
vs.
WESTERN UNION TELEGRAPH COMPANY.

In Debt.

Be it remembered that at the January, 1904, term of this court this case came on for trial, and both parties waived a jury and submitted all matters of law and the facts of the case agreed by both parties to the judge of the court for decision, and thereupon at the same term of the court the said judge gave judgment for the plaintiff (here insert the judgment), and the court afterwards adjourned on the 21st day of January, 1904, and this day, the 2nd day of February, 1904, the defendant company moved the court to set aside the said judgment and grant a new trial of the case because the facts in the case show that the transmission of the message set out and copied in the declaration in this case is interstate commerce and not subject to the control or regulation of sections 1291 and 1292 of the Code of Virginia of 1887, or of either of them, and at the same time and for the same reason the said defendant company moved the court to arrest the said judgment, but the court over-

ruled both of the said motions, and to this action of the court the said defendant company excepts and prays that this, its bill of exceptions, may now on this day, the 2nd day of February, 1904, be signed, sealed and made a part of the record of this case, and that the facts of the case may be certified by the judge and made a part of this bill of exceptions. All of which is accordingly done.

A. M. AIKEN, [SEAL.]
Judge of the Corporation Court of Danville, Va.

16 "Certificate of Facts."

In the Corporation Court of Danville, Va.

C. E. HUGHES
vs.
WESTERN UNION TEL. CO.

In Debt.

I, A. M. Aiken, judge of the corporation court of Danville, Va., do hereby certify that the following are all the facts upon which this case was tried, and which are referred to in the bill of exceptions of the defendant company this day signed by me:

1. That the said message from Danville, Va., to Pocahontas, Va., was delivered to the defendant company at Danville, Va., at 8 o'clock a. m. on November 2d 1903.

2. That it was sent to and received at Richmond, Va., at 8:20 o'clock a. m. on November 2d 1903.

3. That it was sent from Richmond, Va., to Bluefield, W. Va., and was received at said Bluefield, W. Va., at 9:05 a. m. on the said 2d day of November 1903.

4. That the said message was never received at Pocahontas, Va., and was never delivered to the sendee, Miss Isabelle Malone, at Pocahontas inn, Pocahontas, Va., or to any one for her, or to her at any other place, but it was sent by the only possible and proper route from Danville, Va., to Pocahontas, Va.—that is, by Bluefield, W. Va.

5. That the plaintiff C. E. Hughes had an account with T. P. Kinney, the agent of the defendant company at Danville, Va. that telegrams sent by the said Hughes should be charged to him on said account, and although the said Hughes did not pay for the said telegram at the time of delivery at Danville, Va., yet it was charged in said account and was afterwards paid for by said Hughes before this action was brought.

Given under my hand and seal this the 2d day of Feb'y 1904.

A. M. AIKEN, [SEAL.]
Judge of the Corporation Court of Danville, Va.

17 STATE OF VIRGINIA, City of Danville, } *To wit:*

I, Jno. R. Cook, clerk of the corporation court of Danville, in the State of Virginia, do hereby certify that the foregoing is a true transcript of all the record and judicial proceedings of said court in a certain action of debt, lately pending in said court between C. E. Hughes, plaintiff, and the Western Union Telegraph Company, a corporation, duly chartered and doing business as a telegraph company, in the State of Virginia, defendant.

And I also certify that the defendant said Western Union Telegraph Company, has filed a written notice to the plaintiff of its intention to apply for a transcript of said record, which notice was duly accepted by plaintiff's attorney.

Given under my hand this the 12th day of February, 1904.

JNO. R. COOK, Clerk.

Fee of clerk of corporation court of Danville, Va., for making up, copying and certifying record, $5.50. Charged to defendant.

JNO. R. COOK, Clerk.

Copy.
Teste: H. STEWART JONES, C. C.

18 The Commonwealth of Virginia to the — of the — of —, Greeting:

We command you, that from all further proceedings on a judgment pronounced by the corporation court of the city of Danville, Va., on the 9th day of January 1904, in a suit in which C. E. Hughes was plaintiff, and Western Union Telegraph Company, was defendant, you altogether supersede, which judgment before the judges of our supreme court of appeals, in city of Richmond, for cause of error in the same to be corrected, on the petition of the said defendant we have caused to come. We also command you, that you give notice to the said plaintiff that he be before the judges of our said supreme court of appeals, at the city aforesaid, on the first Monday in March next, then and there to have a regearing of the whole matter in the judgment aforesaid contained. And have then there this writ.

Witness—H. Stewart Jones, clerk of our said supreme court of appeals, at Richmond, this 20th day of February 1904, and in the 128th year of the Commonwealth.

H. STEWART JONES, C. C.

Memo.—The above writ of supersedeas is not to be effectual until the petitioner, or some one for it, shall enter into bond, with sufficient security in the clerk's office of the said corporation court, in the penalty of three hundred dollars, conditioned as the law directs, and a certificate of the execution thereof, together with the name or

names of the security or securities, shall be endorsed hereon by the clerk of the said court.

Teste: H. STEWART JONES,
Court Clerk.

(Endorsed.)

Clerk's Office Corporation Court, Danville, Va.

I, Jno. R. Cook, clerk of the corporation court of Danville, Va., hereby certify that L. C. Berkley, Jr., for and in the place
19 and stead of the Western Union Telegraph Company, has this day executed before me bond in the penalty of $300.00 payable and conditioned according to law, as required by the within writ, with T. P. Kinney, his surety, which security is considered by me as sufficient.

Given under my hand this 23rd Feb'ry, 1904.

JNO. R. COOK, Clerk.

I hereby accept legal service of this writ this day, Feb'y 24, 1904.

C. E. HUGHES,
By THOS. HAMLIN, His Att'y.

Feb'y 24/04.

20 WESTERN UNION TELEGRAPH Company v. HUGHES. } Dissenting Opinion by Judge R. H. Cardwell. Keith, P., Concurs.

I am unable to concur in the opinion of the court in this case. The case, upon the agreed state of facts, is, as the opinion states, in all essential features the same as that of W. U. Tel. Co. v. Reynolds, 100 Va., 459, decided June 19, 1902. In each case the action was to recover against the defendant the penalty of one hundred dollars, imposed by sections 1291 and 1292 of the Code of Va. for the failure to transmit and deliver dispatches in the manner and time set forth in those sections. In the former case the message was received by the telegraph company at Radford, Va., while in the present it was received at Danville, Va.; the first was addressed to the sendee at Tom's Creek, Va., and the second to a sendee at Pocahontas, Va., and both were lost at Bluefield, W. Va., where the telegraph company has a relay office, the only route by which the message in either case could be transmitted to its point of destination being via Bluefield W. Va.

That it is settled law, that a telegraph line is an instru-
21 ment of commerce, and that telegraph companies like railroad companies are subject to the regulating power of Congress in respect to their foreign and interstate business, see Postal Tel.-Cable Co. v. Umstadter, 50 S. E., 259; 103 Va., —, and authorities there cited.

This court having in W. U. Tel. Co. *v.* Tyler, 90 Va. 297, and W. U. Tel. Co. *v.* Bright, *ibid.* 778, held that section 1292 of the Code, as applied to a case where the telegram in question was a domestic message, *were* not in conflict with the Constitution of the United States, or any act of Congress passed in pursuance thereof; and construing, as have the courts of other States, the decision of the Supreme Court of the United States in Lehigh Valley R. Co. *v.* Penn., 145 U. S. 192, as authority for the proposition that where both the point at which a telegram is received for transmission and the point to which it is addressed are in the same State, although the line over which the transmission is made passes into another State between the points, the penalty prescribed by the statute may be imposed for the default of the telegraph company occurring in the foreign State, as a reasonable exercise of the police power of the State and not an attempt to regulate commerce violative of the Federal Constitution, the telegram being regarded as a domestic message, dismissed the case of W. U. Tel. Co. *v.* Reynolds,
22 *supra*, the amount involved not being large enough to give jurisdiction to the court.

The opinion by Whittle, J., after stating that the State of Pennsylvania levied a tax on the gross receipts of all railroad companies derived from the transportation by continuous carriage from points in Pennsylvania to other points in the same State, that is to say, passing out of Pennsylvania into another State and back again into Pennsylvania, in the course of transportation, and that the Lehigh Valley R. Co. had no road of its own from Mauch Chunk, Pa., to Philadelphia, but in transporting its coal, and general freight traffic, it used its own line from Mauch Chunk to Phillipsburg, N. J., from which point it was, under an arrangement for a continuous passage with the Pennsylvania R. Co., transported by the latter road via Trenton to Philadelphia and that it was insisted that the State could not tax that part of the gross receipts derived from so much of the transportion as was wholly within the State of Pennsylvania, because the freight, during its entire transportation was impressed with the character of interstate commerce, quotes from the opinion in Lehigh Valley R. Co. v. Pennsylvania, *supra*, as follows: "Commerce undoubtedly is traffic, but it is something more. It is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is
23 regulated by prescribing rules for carrying on that intercourse * * * (Gibbons v. Ogden, 22 U. S.—9 Wheat. 189) * * * The point of departure and the point of arrival were alike in Pennsylvania. The intercourse was between those points and not between any other points. Is such intercourse, consisting of continuous transportation between two points in the same State, made interstate because in its accomplishment some portion of another State may be traversed. Is the transmission of freight or messages between two places in the same State made interstate business by the deviation of the railroad or telegraph onto the soil of another State? * * *

It is simply whether, in the carriage of freight and passengers between two points in the same State, the mere passage over the soil of another State renders that business foreign which is domestic. We do not think such a view can be reasonably entertained, and are of opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk. * * * We will observe, however, that we think that the principle laid down by that (the trial) court is peculiarly adapted to cases like the present, in which there is such an exceptional facility for the evasion of State authority to fix the rate of charges. This may be done in an instant and
24 without expense, by so adjusting the wires that messages must go through a part of the territory of another State."

In the more recent case, however,—Hanley v. Kansas City So. R. Co., 187 U. S. 617—the Supreme Court of the United States gave its own interpretation of the opinion in Lehigh Valley R. Co. v. Pennsylvania, *supra*, and held that the railroad commission of Arkansas could not without violating the commerce clause of the Federal Constitution, fix and enforce rates for the continuous transportation of goods between two points within the State of Arkansas, where a large part of the route is outside of the State, through the Indian Territory or Texas. The opinion, by Mr. Justice Holmes, says: "It is decided that navigation on the high seas between ports of the same State is subject to regulation by Congress (Lord v. Goodall, N. & P. S. S. Co., 102 U. S. 541; 26 L. ed. 224), and is not subject to regulation by the State (Pac. Coast S. S. Co. v. R. R. Com'rs, 9 Sawy. 253, 18 Fed. 10); and, although it is argued that these decisions are not conclusive, the reason given by Mr. Justice Field for his decision in the last cited case disposes equally of the case at bar. 'To bring the transportation within the control of the State, as part of its domestic commerce, the subject transported must
25 be within the entire voyage under the exclusive jurisdiction of the State.' 9 Sawy. 258—19 Fed. 10." A number of other decisions are also cited as being in point.

The court having, in Hanley v. Kansas City So. Ry. Co., *supra*, held that the transportation of goods on a through bill of lading from Fort Smith, Arkansas, to Grannis, Arkansas, over a line of railroad by way of Spiro, in the Indian Territory, a total distance of one hundred and sixteen miles, of which fifty-two miles *is* in Arkansas and sixty-four in the Indian Territory, is interstate commerce, subject to regulation by act of Congress only, the controlling question in the case at bar is, Does the doctrine apply with equal force to a telegraphic dispatch to be transmitted from Danville, Va., to Pocahontas, Va., by way of Bluefield, W. Va., that being "the only possible and proper one from Danville, Va., to Pocahontas, Va.,—that is, by way of Bluefield, West Va.," and the default of the telegraph Co. in transmitting and delivering the dispatch occurring wholly within the State of W. Va.?

As we have seen, it is settled law that a telegraph company oc-

cupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods, both companies being regarded as instruments of commerce and their business com-
26 merce itself. While they do their transportation in different ways, and their liabilities are in some respects different, they are both regarded as indispensable to those engaged to any extent in commercial pursuits. Telegraph Co. v. Texas, 105 U. S. 460 (L. ed. 1067), and W. U. Tel. Co. v. Pendleton, 122 U. S. 356 (L. ed. 1167).

The opinion in Hanley v. Kansas City So. Ry. Co., *supra*, approving the language employed by Mr. Justice Field I have quoted above and citing a number of cases regarded as in point, proceeds as follows: "There are some later State decisions contrary to those last cited. Campbell v. Chicago, Milwaukee & St. Paul Ry. Co., 86 Ia. 587; Seawell v. Kansas City, Fort Scott & Memphis Rd. Co., 119 Mo. 222; Railroad Commissioners v. Western Union Tel. Co., 113 N. C. 213. But these decisions were made simply out of deference to conclusions drawn from Lehigh Valley Railroad Co. v. Pennsylvania, 145 U. S. 192, and we are of opinion that they carry their conclusions too far. * * *"

One of the cases disapproved in Hanley v. Kansas C. &c. Co., *supra*, is Campbell v. Chicago &c. Ry. Co., *supra*, holding that "an act of the legislature, providing that regulations fixing maximum rates of freight that may be charged by railroad companies for the transportation of property between points within the State of Iowa should be applicable whether such transportation shall be
27 wholly within this State or partly within this State and an adjoining State or States, is not in conflict with sec. 8 of art. 1 of the U. S. Constitution as being a regulation of commerce."

Another is Railroad Com'rs v. W. U. Tel. Co., 113 N. C. 213, *supra*, (cited in W. U. Tel. Co. v. Reynolds, *supra*), where it was held that telegraph messages transmitted by a company from and to points in the State, although traversing another State in the route, do not constitute interstate commerce and are subject to the tariff regulations of the commission.

While the court, in Hanley v. Kansas C. &c. Co., *supra*, referring to the case of Lehigh Valley &c. Co. v. Pennsylvania, *supra*, says "that was the case of a tax and was distinguished expressly from an attempt by a State directly to regulate the transportation while outside its borders," thus recognizing the distinction indicated in Pac. Coast S. S. Co. v. Rd. Com's, *supra*, the only reasonable conclusion to be drawn from the opinion, as it appears to me, is, that the doctrine there announced has full and complete application to the transmission of a telegrapic dispatch from one point in a State to another point in the same State, traversing another State in its route, where the default in transmitting and delivering the dispatch occurred wholly within the foreign State.

28 Unlike the case of W. U. Tel. Co. v. James, 162 U. S. 650, where the default of the telegraph company occurred wholly

in the State of Georgia, and that of Postal Tel.-Cable Co. v. Umstadter, *supra*, where the default took place in this State, the meaning of the certificate of facts in the case at bar is, that the message was delivered to plaintiff in error at Danville, Va., to be transmitted to Pocahontas, Va., and could not be transmitted from its point of origin to its point of destination without passing through the territorial limits of the State of West Virginia; that the message was transmitted by plaintiff in error from Danville, Va., to Richmond, Va., and from Richmond to Bluefield, W. Va., and that it was received at Bluefield where it was last heard from; it thus appearing that the default of plaintiff in error, for which the penalty prescribed by the statute is imposed in this case, occurred wholly within the State of West Virginia.

I am of opinion that upon this state of facts this court is bound by the decision of the Supreme Court of the United States in Hanley v. Kansas City &c. Co., *supra*, to hold that the statute, in so far as it authorizes the imposition of the penalty in such a case, transcends the police power of the State and violates sec. 8, art. 1, of the Constitution of the United States.

29 Corporation Court of City of Danville.

WESTERN UNION TELEGRAPH COMPANY v. HUGHES. } Opinion by Judge Stafford G. Whittle.

WYTHEVILLE, VA., June 22, 1905.

The facts in this case are essentially the same as in the case of Western Union Telegraph Company v. Reynolds, reported 100 Va., 459, where the court sustained a judgment against the company for the statutory penalty, for failure to transmit and deliver a telegram, the initial and terminal points of which were both within the State of Virginia, notwithstanding the circumstance that the line passed in part over the territory of another State.

It is insisted, however, by counsel for plaintiff in error that this doctrine has been overruled by the decision of the Supreme Court of the United States in the more recent case of Henley v. Kansas City So. R. Co., 187 U. S. 617.

We cannot assent to that contention. In the last named case the court merely decided that the railroad commission of the State of Arkansas could not, without violating the commerce clause of the Federal Constitution, fix and enforce rates for the continuous transportation of freight between two points in the State of Ar-
30 kansas, where a large part of the route is outside of the State through the Indian Territory or Texas. The distinction between that case and the case at bar is obvious. In the latter there is no attempt to fix and enforce rates for the transmission of telegrams, but the court simply upheld the recovery of a penalty im-

posed by the statute upon a telegraph company doing business in the State for failure to transmit faithfully and impartially, and as promptly as practicable, a telegram, in accordance with its contract. This principle was distinctly recognized and sustained by the Supreme Court of the United States in construing a similar statute of the State of Georgia, in the case of Western Union Telegraph Company v. James, 162 U. S. 650, the authority of which is in no wise impaired by the case referred to.

It is true that this court, in the Reynolds case, cited and relied on Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, as analogous authority. But it will be observed that that case, like the case of Hanley v. Kansas City So. R. Co., involved the power of a State to fix the rate of taxation upon the receipts of a railway company "for the mileage within the State, from transportation by continuous carriage from a point in the State, but over a line which, in its course between these points, passed out of the State into another State
31 and back again into the State." It was that doctrine and not the principle of the James case that has been modified by the recent decision of the Supreme Court of the United States.

The case in judgment, in our opinion, involves the exercise of an important police power of the State, a power which ought not to be surrendered and which we are unwilling to surrender in the absence of a direct and authoritative declaration on the part of the Supreme Court of the United States that it is violative of the Federal Constitution.

For these reasons the court will adhere to its former decision and dismiss the case for want of jurisdiction.

32 VIRGINIA:

In the Clerk's Office of the Supreme Court of Appeals in the City of Richmond, on the 3rd day of July, 1905.

The following copy of an order of this court, entered at its place of session at Wytheville was this day received by the clerk here and is as follows:

"VIRGINIA:

In the Supreme Court of Appeals, Held at the Court House of Wythe County, in the Town of Wytheville, on Thursday, the 22nd day of June, 1905.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,
against
C. E. HUGHES, Defendant in Error.

Upon a Writ of Error and Supersedeas to a Judgment Rendered by the Corporation Court of the City of Danville on the 9th Day of January, 1904.

This cause, which is pending in this court at its place of session at Richmond, having been fully heard but not determined at said place of session, this day came here the parties, by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion for reasons stated in writing and filed with the record that the writ in this case was improvidently awarded and that this court hath no jurisdiction to entertain the same. It is therefore considered by the court that this writ of error be dismissed and that the plaintiff in error pay to the defendant in error damages according to law and his costs by him in this behalf herein expended.

Which is ordered to be entered in the order book here and forthwith certified, together with a certified copy of the opinion in this case, to the clerk of this court at Richmond, who will enter this order in the order book there and certify it to the said corporation court of the city of Danville.

A copy,
Teste: J. M. KELLY, C. C.

33 In the Supreme Court of Appeals of Virginia, at Richmond.

STATE OF VIRGINIA,
City of Richmond, } *To wit:*

I, H. Stewart Jones, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that the foregoing printed record contained in seventeen pages and one page of index, and fourteen additional manuscript pages, is a true and perfect transcript of the record of the suit in the case of Western Union Telegraph Company against C. E. Hughes remaining in the clerk's office of the said court at the city of Richmond, Virginia, upon which said record the said case was heard, tried and determined by the court aforesaid.

In witness and attestation whereof I hereunto set my hand and

affix the seal of said court at Richmond, Virginia, on this the 11th day of August, 1905.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,
Clerk Supreme Court of Appeals of the
State of Virginia, at Richmond.

STATE OF VIRGINIA,
City of Richmond, } *To wit:*

I, James Keith, one of the judges and president of the supreme court of appeals of Virginia, do hereby certify that the attestation of the above record of Western Union Telegraph Company against C. E. Hughes, remaining in the clerk's office of the said court at Richmond, Virginia, made by H. Stewart Jones, the clerk of said court at Richmond, aforesaid, is in due form.

Given under my hand and seal this the 11th day of August, 1905.

JAMES KEITH,
President Supreme Court of Appeals of Virginia.

34 In the Supreme Court of Appeals of Virginia.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,
against
C. E. HUGHES, Defendant in Error.

Assignment of Errors.

The Western Union Telegraph Company, plaintiff in error, comes and files herewith its petition for a writ of error and says that there are errors in the record and proceedings of the above entitled cause and makes the following assignment:

The supreme court of appeals of Virginia erred (1) in failing to reverse the judgment rendered by the corporation court of Danville (Virginia) in favor of C. E. Hughes against the Western Union Telegraph Company for one hundred dollars with interest and costs; (2) erred in holding that the writ of error awarded by it (the said supreme court of appeals of Virginia) in the above styled case was improvidently awarded; and (3) erred in holding that it had no jurisdiction to entertain said writ of error. The said supreme court of appeals of Virginia should have reversed the said judgment rendered by the corporation court of Danville, (and should have entered judgment in favor of the plaintiff in error:) The said judgment was controverted and drawn in question by the plaintiff in error on the ground that said judgment was and is repugnant to the Constitution of the United States (article 1, section 8, providing that the Congress shall have power "to regulate commerce with foreign

nations and among the several States and with the Indian tribes) and in contravention thereof in the following particulars:

First. That the supreme court of appeals of Virginia erred in failing to hold that the transmission of the telegraphic dispatch described in this case was interstate commerce and not subject
35 to the control or regulation of sections 1291–1292 of the Code of Virginia, edition of 1887, or either of them.

Second. The supreme court of appeals of Virginia erred (1) in failing to hold that the transmission of said telegraphic dispatch from Danville, Virginia, to Pocahontas, Virginia, by way of Bluefield in the State of West Virginia, where said dispatch was lost,—was interstate commerce; and (2) in failing to hold that said sections 1291–1292, and each of them, of the Code of Virginia, edition of 1887, as applied (*a*) to said telegraphic dispatch, (*b*) to its transmission within the State of West Virginia, and (*c*) to its loss within the territorial limits of the State of West Virginia,—were and are repugnant to article 1, section 8 of the Constitution of the United States.

For these reasons the supreme court of appeals of Virginia should have reversed said judgment of the corporation court of Danville and should have rendered judgment in favor of the plaintiff in error.

Third: The said final judgment of the supreme court of appeals of Virginia is erroneous in not holding said judgment, rendered by said corporation court of Danville against the plaintiff in error, to be a regulation of interstate commerce by the State of *State of* Virginia in violation of and repugnant to article 1, section 8 of the Constitution of the United States, which gives to Congress the power "to regulate commerce with foreign nations and among the several States and with the Indian tribes."

For which errors the plaintiff in error, the Western Union Telegraph Company, prays:

1. That said judgment of the supreme court of appeals of Virginia, dated the 22nd day of June, 1905, may be reviewed and reversed, and that a judgment may be rendered in favor of the said plaintiff in error and for costs.

2. That said judgment rendered by the corporation court of Danville, Virginia, in favor of C. E. Hughes against the plaintiff in error, the Western Union Telegraph Company, may be reviewed and reversed and annulled, and that a judgment may be rendered
36 in favor of the said plaintiff in error.

3. That all such other and further and general and complete relief as may be proper in the premises may be granted.

WESTERN UNION TELEGRAPH COMPANY,
By A. L. HOLLADAY, Its Counsel.

37 In the Supreme Court of Appeals of Virginia.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,
against
C. E. HUGHES, Defendant in Error.

Petition for Writ of Error.

Considering itself aggrieved by the final decision of the supreme court of appeals of Virginia in rendering judgment against it in the above entitled case on June 22, 1905, the Western Union Telegraph Company, the plaintiff in error, hereby prays a writ of error and supersedeas from the said decision and judgment to the Supreme Court of the United States. Assignment of errors is hereto attached.

WESTERN UNION TELEGRAPH COMPANY,
By A. L. HOLLADAY, Its Counsel.

Supreme Court of Appeals of Virginia.

Let the writ of error issue upon the execution of a bond by the plaintiff, Western Union Telegraph Company, or some one for it, to the defendant, C. E. Hughes, in the sum of five hundred dollars ($500.); said bond, when approved, to act as a supersedeas.

Dated August 11th, 1905.

JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

38 WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,
against
C. E. HUGHES, Defendant in Error.

Bond.

Know all men by these presents, that we —— —— as principal and the Virginia Trust Company, a corporation chartered and existing under the laws of the State of Virginia, as surety, are held and firmly bound unto C. E. Hughes in the sum of five hundred dollars to be paid to said C. E. Hughes, to which payment, well and truly to be made, we bind ourselves jointly and severally, firmly by these presents.

Sealed with our seals and dated this — day of August, 1905.

Whereas, The Western Union Telegraph Company, plaintiff in error in the above entitled cause, seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled case by the supreme court of appeals of Virginia.

Now, therefore, the condition of this obligation is such that if the

above named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

JOHN S. CALVERT. [SEAL.]
VIRGINIA TRUST COMPANY.
[SEAL.] By L. D. AYLETT, Sec't'y.

39 STATE OF VIRGINIA, City of Richmond, } *ss:*

Lewis D. Aylett, secretary of the Virginia Trust Company, the surety named in the foregoing bond, being first duly sworn, deposes and says as follows:

I am the secretary of the Virginia Trust Company, whose name is subscribed to the foregoing bond, and whose seal is affixed thereto, and I state that the said Virginia Trust Company, is worth the sum of five hundred ($500.00) dollars named therein, as the penalty thereof, over and above all its just debts and liabilities, exclusive of property, which is exempt from execution, and that the execution of the foregoing bond is duly authorized by law, and also by a resolution of the board of directors of the said Virginia Trust Company.

LEWIS D. AYLETT,
Secretary Virginia Trust Company.

Sworn and subscribed to before me this 10th day of August, 1905.

JNO. H. SOUTHGATE,
Notary Public.

My commission expires Feb. 25, 1905.

The foregoing bond is approved.

JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

The original of the foregoing supersedeas bond was lodged with the clerk of the supreme court of appeals of Virginia on August 11, 1905, and the following endorsement made thereon: Bond. Filed August 11, 1905.

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia.

40 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of appeals of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court of appeals of the State of Virginia, before you, or some of you, being the

highest court of law or equity of the said State in which a decision could be had in the said suit between The Western Union Telegraph Company, plaintiff in error, and Charles E. Hughes, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Western Union Telegraph Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning
41 the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at the city of Washington, District of Columbia, on the 9th day of September, 1905, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 11th day of August, in the year of our Lord 1905.

[Seal United States Circuit Court, Eastern District of Virginia.]

JOSEPH P. BRADY,
Clerk United States Circuit Court for
the Eastern District of Virginia.

Allowed by

JAMES KEITH,
President of the Supreme Court
of Appeals of Virginia.

The original of the foregoing writ of error was lodged with the clerk of the supreme court of appeals of Virginia on August 11th, 1905, and also at the same time and place a copy thereof for *the* C. E. Hughes. The following endorsement was made upon the said

original writ and upon the copy: Writ of error. Filed, August 11th, 1905.

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia.

42 [Endorsed:] Writ of error. Filed Aug. 11, 1905 Western Union Tel. Co. v. Hughes.

43 Citation.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Charles E. Hughes, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of appeals of Virginia, at Richmond, wherein you are defendant in error and The Western Union Telegraph Company is plaintiff in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the president of the supreme court of appeals of Virginia, this 11th day of August, 1905.

JAMES KEITH,
President of the Supreme Court of Appeals of Virgin

Attest: H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia.

A copy.
Teste: H. STEWART JONES, C. C.

44 Executed by delivering Charles E. Hughes a true copy of the within citation on the 14th day of August 1905 within my bailiwick.

P. H. BOISSEAU,
Sergeant of the City of Danville, Va.

Fee 50 cts.

45 Return to Writ.

UNITED STATES OF AMERICA,
Supreme Court of Appeals of Virginia, } *ss:*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said supreme court of appeals, in the city of Richmond, this 11th day of August, 1905.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

_____,
Clerk Supreme Court of Appeals of Virginia, at Richmond.

Costs of this record:
$16.98, paid by Western Union Telegraph Company.

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia, at Richmond.

Endorsed on cover: File No. 19,913. Virginia supreme court of appeals. Term No. 411. The Western Union Telegraph Company, plaintiff in error, vs. Charles E. Hughes. Filed September 29th, 1905. File No. 19,913.

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FILED
OCT 15 1906

Supreme Court of the United States.

No. 119.

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

vs.

CHARLES E. HUGHES,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN F. DILLON,
GEORGE H. FEARONS,
RUSH TAGGART,
FRANCIS RAYMOND STARK,
Attorneys for Plaintiff in Error.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

Stillman Appellate Printing Co., 6 Park Place, N. Y.

Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff-in-Error,

against

CHARGES E. HUGHES,
Defendant-in-Error.

No. 411.

STATEMENT.

This case comes into this Court by writ of error from the Supreme Court of Appeals of the State of Virginia. The plaintiff in error challenges the judgment of that tribunal on the ground that the judgment is based on two statutes of the State of Virginia, which are claimed, in so far as they, or either of them, have been held to apply to the subject matter of this suit, to be in violation of the commerce clause of the Federal Constitution. The acts in question are as follows (the section numbers given being from the Code of Virginia of 1887):

> "Section 1291. **Receipt and transmission of dispatches.** It shall be the duty of every telegraph or telephone company doing business in this State, to receive dispatches from and for other telegraph or telephone companies or lines, and from and for any person; and upon the payment of the usual

charges therefor, according to the regulations of the company, to transmit the same faithfully and impartially and as promptly as practicable, and in the order of delivery to the said company. For every failure to transmit a dispatch, faithfully and impartially, and for every failure to transmit a dispatch as promptly as practicable, or in the order of its delivery to the company, the company shall forfeit the sum of one hundred dollars to the person sending or wishing to send such dispatch. But nothing herein shall prevent any such company from giving preference to dispatches on official business from or to officers of the United States or the State of Virginia, or from making arrangements with proprietors or publishers of newspapers, for the transmission to them, for publication, of intelligence of general and public interest, out of its regular order.

"Section 1292. **Their Delivery.** It shall be the duty of every telegraph or telephone company, upon the arrival of a dispatch at the point to which it is to be transmitted by said company, to deliver it promptly to the person to whom it is addressed, where the regulations of the company require such delivery, or to forward it promptly as directed, when the same is to be forwarded. For every failure to deliver or forward a dispatch as promptly as practicable, the company shall forfeit one hundred dollars to the person sending the dispatch, or to the person to whom it was addressed."

The record in the case at bar shows the following facts:

On November 2, 1903, at 8.00 a. m. Hughes, the defendant in error (plaintiff below), delivered to the Western Union Telegraph Company, the plaintiff in error (defendant below), at its office in the City of Danville, in the State of Virginia, a certain message

addressed to Miss Isabelle Malone, Pocahontas, Va., care of Pocahontas Inn, reading as follows: "Mother taken sick Saturday night, am afraid fatal attack, wrote you yesterday, come if can," signed "C. E. Hughes," to be transmitted over the defendant's lines from its office at Danville to the town of Pocahontas, and there to be delivered to Miss Isabelle Malone, the addressee, who was then living at the Pocahontas Inn at Pocahontas. The defendant's charges for transmitting and delivering this message were not paid by the plaintiff at the time he delivered the message to the defendant, but were charged to his account, and subsequently, and before this suit was brought, paid by him. The only possible and only proper route for the transmission of a telegraphic message from Danville, Va., to Pocahontas, Va., was, on the day in question, by way of Bluefield, W. Va. (Record, p. 13). The message which is the subject of this suit was sent by the defendant from its office at Danville, Va., to its office at Richmond, Va., at 8.20 a. m., on November 2, 1903, and from its office at Richmond, Va., to its office at Bluefield, W. Va., at 9.05 a. m., on the same day. It was duly received at Bluefield (Record, p. 13). The message, however, was never received by the Western Union over its wires or in its office at Pocahontas, Virginia, and was never delivered to the addressee, Miss Isabelle Malone, at the Pocahontas Inn there, or to her or to any one for her at any other place (Record, p. 13).

On November 10, 1903, the plaintiff commenced this suit in the Corporation Court of Danville, Va. On the first Monday in December, 1903, he filed in that court his declaration, alleging:

> "that it was the duty of the said defendant company to transmit the said message faithfully, impartially and as promptly as practic-

> able to the said Miss Isabelle Malone, at Pocahontas Inn, Pocahontas, Virginia. Yet the said plaintiff avers that the said defendant company wholly failed to discharge its duty in this regard to the plaintiff, and did not faithfully and impartially and as promptly as practicable transmit the said message to the said Miss Isabelle Malone, at Pocahontas Inn, Pocahontas, Va., and in consequence of the said breach of duty on its part and of its failure to transmit faithfully, impartially, and promptly as practicable the said message of the said defendant company, under the statutes in such case made and provided, became indebted to the said plaintiff in the sum of One hundred dollars ($100)" (Record, p. 9).

On the third Monday in December, 1903, the defendant filed its written demurrer, and also written plea of the general issue.

Thereafter on January 9, 1904, the defendant's demurrer was overruled, issue was joined, a jury was waived, and the Court, after hearing the evidence adduced, rendered a judgment in favor of the plaintiff for the amount claimed in the declaration, $100 statutory penalty, together with interest thereon from that date (Record, p. 11). Thereafter, and during the same term of the Court, the defendant moved to set aside the judgment and grant a new trial

> "because the facts in the case show that the transmission of the message set out and copied in the declaration in this case is interstate commerce and not subject to the control or regulation of Sections 1291 and 1292 of the Code of Virginia of 1887, or of either of them" (Record, p. 12).

And at the same time, and for the same reason the defendant moved the Court to arrest the judgment. (*Ibid.*)

The Federal question was distinctly raised by both of these motions made by the defendant.

Both motions were overruled, a bill of exceptions was taken and the case carried to the Supreme Court of Appeals of Virginia (Record, pp. 12, 13 and 14). The Supreme Court of Virginia, by a divided vote of three to two, decided, for reasons incorporated in the record (Record, pp. 19 and 20), that the writ of error on which the case was taken thither from the Corporation Court of Danville was improvidently awarded because no Federal question was involved in the case; and therefore that the Supreme Court had no jurisdiction to entertain it, and ordered that the writ be dismissed (Record, p. 21).

Under the Constitution of Virginia which went into effect July 10, 1902, and was the law of the State under which this case was tried, *the Supreme Court of Appeals, in reaching the conclusion that it had no Appellate Jurisdiction over the case, necessarily decided that, in its opinion, no Federal question was involved in the case;* since the State Constitution provided that the Supreme Court of Appeals should have appellate jurisdiction "in all cases involving the constitutionality of a law as being repugnant to the Constitution of this State or of the United States" (Article VI, Section 88, 2nd paragraph).

From this final judgment of the Supreme Court of Appeals of Virginia, dated June 22, 1905, which, as has been shown, necessarily involved a determination by that Court that no Federal question was involved, the writ of error is prosecuted to this Court.

ERRORS ASSIGNED.

The assignment of errors in this Court is as follows (Record, pp. 22, 23):

"The Supreme Court of Appeals of Virginia erred (1) in failing to reverse the judgment rendered by the Corporation Court of Danville (Virginia) in favor of C. E. Hughes against the Western Union Telegraph Company for One hundred dollars with interest and costs; (2) erred in holding that the writ of error awarded by it (the said Supreme Court of Appeals of Virginia) in the above styled case was improvidently awarded; and (3) erred in holding that it had no jurisdiction to entertain said writ of error. The said Supreme Court of Appeals of Virginia should have reversed the said judgment rendered by the Corporation Court of Danville (and should have entered judgment in favor of the plaintiff in error). The said judgment was controverted and drawn in question by the plaintiff in error on the ground that said judgment was and is repugnant to the Constitution of the United States (Article 1, Section 8) providing that Congress shall have power 'to regulate commerce with foreign nations and among the several States and with Indian tribes, and in contravention thereof in the following particulars:

"First. That the Supreme Court of Appeals of Virginia erred in failing to hold that the transmission of the telegraphic dispatch described in this case was interstate commerce and not subject to the control or regulation of Sections 1291-1292 of the Code of Virginia, edition of 1887, or either of them.

"Second. The Supreme Court of Appeals of Virginia erred (1) in failing to hold that the transmission of said telegraphic dispatch from Danville, Virginia, to Pocahontas, Virginia, by way of Bluefield in the State of West Virginia, where said dispatch was lost—, was interstate

commerce; and (2) in failing to hold that said Sections 1291-1292, and each of them, of the Code of Virginia, edition of 1887, as applied (*a*) to said telegraphic dispatch, (*b*) to its transmission within the State of West Virginia, and (*c*) to its loss within the territorial limits of the State of West Virginia, were and are repugnant to Article 1, Section 8, of the Constitution of the United States.

"For these reasons the Supreme Court of Appeals of Virginia should have reversed said judgment of the Corporation Court of Danville and should have rendered judgment in favor of the plaintiff in error.

"Third. The said final judgment of the Supreme Court of Appeals of Virginia is erroneous in not holding said judgment, rendered by said Corporation Court of Danville against the plaintiff in error, to be a regulation of interstate commerce by the State of Virginia in violation of and repugnant to Article 1, Section 8, of the Constitution of the United States, which gives to Congress the power 'to regulate commerce with foreign nations and among the several States and with the Indian tribes.'"

ARGUMENT.

I.

THE MESSAGE SUED ON IN THIS CASE WAS AN INTERSTATE MESSAGE, AND, AS SUCH, INTERSTATE COMMERCE.

It is settled by numerous decisions of this Court that a telegraph message is commerce, and that, consequently, a message originating in one State and destined to a point in another State is interstate commerce.

W. U. vs. Pendleton, 122 U. S., 347.
W. U. vs. Texas, 105 U. S., 460.
Leloup vs. Mobile, 127 U. S., 640.
W. U. vs. James, 162 U. S., 650.

The question is whether a message is interstate commerce when it originates in one State and is destined to another point in the same State, but must necessarily be transmitted to and be retransmitted or in telegraphers' parlance "relayed" in another State before it can reach its destination.

The message in the case at bar was to be sent from Danville, Virginia, to Pocahontas, Virginia. But in order to send it to Pocahontas, from Danville, it was necessarily sent first to Bluefield, West Virginia, and received at that point. This was the *only possible way* to send it to Pocahontas, Virginia (Record, p. 13), and, therefore, the *proper way* (Ibid.).

Is such a message interstate commerce?

Why it was Necessary that Messages for Pocahontas Should be Repeated or Relayed at Bluefield.

The record is not burdened by the recital of certain facts within the knowledge of everyone at all familiar with the business of telegraphy, and which indeed may be said to be matters of general knowledge—at any rate facts as to which it is conceived that there can be no dispute in this case.

The record recites that this message was sent to Bluefield, W. Va., and that this was the *only possible way*, and the *proper way* (Record, p. 13), to transmit it to Pocahontas. There is no suggestion in the case that the purpose of relaying the message at Bluefield, W. Va., was to evade the operation of the laws of Vir-

ginia, or any of them. Why it was necessary and proper that the wire used in the transmission of this message should pass over the soil of the State of West Virginia is apparent from a glance at the map. Pocahontas, the destination of the message, is situated between two ranges of mountains; on the south, the East River Mountain; on the north, the Big Stone Ridge. Only one railway line, the Norfolk & Western, runs between these ridges or mountain ranges, and affords Pocahontas the means of communication with other points, whether in Virginia or elsewhere. To the west of Pocahontas this railroad, with its connections, passes out of the State of Virginia by way of Gibson's Station and the Cumberland Gap, affording no means of reaching Danville or other points in eastern or southern Virginia without first traversing the territory of some other State. Eastwardly from Pocahontas, in order to avoid the ridges of mountains, the railroad line *necessarily* passes through about sixteen miles of that part of the State of West Virginia which is bounded on the south by the East River Mountain, and in which is situated Bluefield.

The telegraph line, as usual, follows the railroad —a necessary part of the railroad's system, and its inseparable adjunct; following, with the railroad, the line of least resistance, and crossing a State boundary line rather than a range of mountains.

The necessity, therefore, for the relaying of this message at Bluefield was a physical and actual necessity; not an invention by the plaintiff in error for the purpose of escaping the laws of Virginia.

It is a matter of general knowledge, moreover, that a company engaged in the conduct of a general telegraph business usually maintains thousands of offices, between any two of which it holds itself out to the public as prepared to offer the

means of communication by telegraph. The necessity of "relaying" messages proceeds from the fact that it is physically impossible for all of these many thousand offices to have a wire connecting directly with all the others. To do so would require the maintenence in each office of an impossible number of wires, and an impossible number of sets of instruments and operators, out of all proportion to the requirements of ordinary traffic, and to the great detriment of the telegraph service generally; without mentioning the burdening of the public highways, the post-roads of the United States, by these additional wires, to the equally great detriment of the public travel thereon. Hence the invention of the relaying process. The essential feature of this is the establishment of a system of large offices from each of which wires radiate to the small offices in a given territory, and which are connected with one another by trunk lines. The small offices send their messages to the nearest large relay point, over a wire which ends at the relay office; at the relay office the messages are written down by the operator who receives them, and are then transferred to the operator who sends then, over another and different wire, to the place of destination, or the next relay point, and this is the only way in which telegraphing for any considerable distance has ever been conducted, or can be conducted, and it is the explanation why the message in the case at bar was not sent direct, by one single act of transmission, from Danville to Pocahontas, but was necessarily and properly sent first to Richmond, and then to Bluefield in the endeavor to transmit it to its destination.

If Danville could have sent the message direct to Pocahontas, it would have done so; but for Dan-

ville to send it direct would have been as impossible as for San Francisco or for New York.

If Richmond could have sent it direct to Pocahontas it would have done so; but for Richmond to send it direct was as impossible as for Danville.

On Principle, the Message Sued On was Interstate Commerce.

If the question were absolutely *res nova*, it would seem that the answer to it should not be difficult.

The object of the Constitutional provision conferring on Congress power to regulate interstate commerce was to protect such commerce. It was to prevent a single State from prohibiting such commerce or burdening it with restrictions which would render it impossible practically and thereby work injury to the people of other States. It was to prevent different States, each, perhaps, acting in good faith and with the best intentions, from imposing on the same act of interstate transportation or transmission different and perhaps conflicting rules and regulations with all of which it might be impossible to comply. It was to prevent one State from insisting, with force if necessary, on the application of its own domestic policy to commerce passing through other States.

We venture, therefore, to assert, as a broad principle, that:

Whenever transportation or transmission is of such a character that unless it is to be regarded as interstate commerce it would be within the power of one State, acting with due process of law, to impede or prevent the thing transported or transmitted from reaching the territory of another State, for which it is destined, then that transportation or that transmission is within the protection of the

Constitutional provision, and not subject to regulation by either State.

If this is a correct statement of the law, the message in the case at bar is an interstate message.

It originated at Danville, Va., and was destined to Pocahontas, Va. But in order to send a message from Danville to Pocahontas, it was necessary, as was found as a fact by the trial court, and the reasons for which have been fully set out heretofore, first that it should be sent over one wire to Bluefield, West Virginia, and received there, and secondly, that some one at Bluefield, West Virginia, should send it (over another wire, or the "relaying" process would not be necessary or proper) to Pocahontas, Va.

The telegraph line used in this process was an interstate line. A part of it, a part necessarily used in the transmission of this message, was within the territorial jurisdiction of the State of West Virginia and subject to the State of West Virginia's physical control. The Bluefield relay office was in West Virginia, and under its control and jurisdiction. Consequently the State of West Virginia, unless prevented from so doing by the fact that the message was interstate commerce, could have (1) forbidden and forcibly prevented the transmission of the message over its territory, if, for any reason, such transmission had been deemed contrary to the domestic policy of that State; or (2) prescribed the order in which, with reference to other messages, it should be transmitted from Bluefield after its receipt there; prescribing, perhaps, a different order of transmission from that prescribed by the statute of Virginia under which the suit is brought; preferring, perhaps, some other message which under the Virginia statute the telegraph company was not authorized to prefer; or

(3) regulated the rate which should be charged for that portion (at least) of the transmission service which took place within the State of West Virginia.

The plaintiff in error respectfully insists that the State of West Virginia could have done none of these things; and if it could not, the limitation on its power can arise only from the fact that the message was interstate commerce.

Confusion Arising from Lehigh Valley Railroad vs. Pennsylvania.

Had it not been for the decision in Lehigh Valley vs. Pennsylvania, 145 U. S., 192 (1891), it is believed that it would not have been seriously conceived by any State Court that, under the Constitution of the United States, commerce passing out of the physical and territorial jurisdiction and control of the State of its origin and into that of a foreign State, should properly be regarded as other than interstate commerce, because of the further circumstance that such commerce eventually returned to a point of destination within the State of its origin. The idea that such commerce is domestic, and not interstate, is, it is respectfully submitted, a fiction. And it is a fiction wholly attributable to the Lehigh Valley case (*supra*).

In that case the question arose as to the validity of a tax imposed by the State of Pennsylvania on the Lehigh Valley Railroad Company, a corporation of Pennsylvania, on account of transportation done by it from Mauch Chunk, in that State, to Philadelphia, in the same State, by way, however, of Phillipsburg, in the State of New Jersey.

The Chief Justice, in delivering the opinion of the Court, said:

"*The tax under consideration here was determined in respect of receipts for the proportion of the transportation within the State*, but the contention is that this could not be done because the transportation was an entire thing, and in its course passed through another State than that of the origin and destination of the particular freight and passengers. THERE WAS NO BREAKING OF BULK OR TRANSFER OF PASSENGERS IN NEW JERSEY. The point of departure and the point of arrival were alike in Pennsylvania. The intercourse was between those points and not between any other points. Is such intercourse, consisting of continuous transportation between two points in the same State, made interstate because in its accomplishment some portion of another State may be traversed? Is the transmission of freight or messages between two places in the same State made interstate business *by the deviation of the railroad or telegraph line on to the soil of another State?*"

* * * * * *

"It should be remembered that *the question does not arise* as to the power of any other State than the State of the termini, nor as to taxation upon the property of the company situated elsewhere than in Pennsylvania, *nor as to the regulation by Pennsylvania of the operations of this or any other company elsewhere*, but it is simply whether, in the carriage of freight and passengers between two points in one State the mere passage over the soil of another State renders that business foreign, which is domestic. We do not think such a view can be reasonably entertained, and are of opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk."

Even Under Lehigh Valley vs. Pennsylvania, the Message in this Case Should Be Treated as Interstate.

The language used by the Chief Justice in the Lehigh Valley case, has, as we shall hereafter show, been seriously misunderstood and misapplied.

But even under that decision, and giving full weight to the dicta contained in the opinion and not strictly necessary to the determination of the controversy before the Court, it is clear that the statute of Virginia now in question would not have been sustained, in its application to this message, on the principle then recognized by the Court.

Whether the Chief Justice was or was not wholly correct in his suggestion that the transmission of freight or messages between two places in the same State was not "made interstate business by the deviation of the railroad or telegraph line on to the soil of another State" (*i. e.*, by such deviation *alone*) he clearly recognized that a different situation would have existed and that a different conclusion would have been called for had there been *anything more than a mere deviation* of the railroad or telegraph line.

He said:

> *"There was no breaking of bulk or transfer of passengers in New Jersey."*

In the case at bar there was clearly, it is submitted, that which in the transmission of a telegraph message is equivalent to a breaking of bulk or a transfer of passengers in the transportation of freight or persons.

In the case at bar it was necessary that the message in question should be "relayed" at Bluefield,

in the State of West Virginia (Record, p. 13). To relay a message, as has been seen, involves two separate acts. It involves the receipt of the message over one telegraph wire by an operator, who writes it down as he receives it, and its transmission over another and different telegraph wire, to its designation, or the next relay point, by a telegraph operator—the one who received it, or some other. In any event it involves two separate acts: It involves the act of receipt, and the act of further transmission. That both of these acts were involved in the case of the message sued on, and that both acts were to be done at Bluefield, outside the State of Virginia, appears clearly from the Certificate of Facts (Record, p. 13). The message was sent to Bluefield (Certificate of Facts, Subdivision 3); the message was received at Bluefield (*Ibid.*); and the message was never received at Pocahontas, Va.—the next point (Certificate of Facts, Subdivision 4).

Had this situation been presented to the Court that decided the Lehigh Valley case, it is submitted that the transaction would clearly have been held to be interstate commerce. There was a transshipment. There was a breaking of bulk.

There is a second reason why, even under the doctrine of the Lehigh Valley case, it is impossible to sustain this statute of Virginia, in its application to the message in the case at bar.

The decision in the Lehigh Valley case was, first and last, *a tax decision*. It did not involve, and should never have been understood to involve any question of the regulation of commerce. It involved nothing more than the taxation of property, and nothing *but the taxation of property within the State*.

Said the Chief Justice:

"The tax under consideration here was determined in respect of receipts *for the proportion of the transportation within the State.*"

Said the Chief Justice again:

"It should be remembered that the question does not arise * * * as to taxation upon the property of the company situated elsewhere than in Pennsylvania,"—

(This is singularly clear.)

—"*nor as to the regulation by Pennsylvania of the operations of this or any other company elsewhere,*" etc.

It is not to be supposed for a moment that the transportation involved in the Lehigh Valley case would, by any fiction, have been regarded as domestic to Pennsylvania, had the question been presented in a form involving, not the power of the State of Pennsylvania *to tax property* within its own limits, but the power of the State of Pennsylvania *to regulate the acts of a carrier in the State of New Jersey*, or to provide what the carrier should do in that State, or how the carrier should do it.

State Decisions Following and Improperly Extending Lehigh Valley R. R. vs. Pennsylvania.

The three most conspicuous examples of the lengths to which the fiction adopted in the Lehigh Valley case has been carried are:

Campbell vs. Chicago, etc., Railway, 86 Iowa, 587.

Seawell vs. Kansas City, etc., Railway, 119 Mo., 222.

State *ex rel.* R. R. Commissioners vs. W. U. Tel. Co., 113 N. C., 213.

As all these cases may be considered overruled, in so far as they relate to this particular point, by Hanley vs. Kansas City Southern Ry. Co., 187 U. S., 617, and as the three cases first named would be decisive of the case at bar in a manner contrary to the contention of the plaintiff in error, they may be briefly examined.

Campbell vs. Chicago, etc., Railway involved the validity of an order of the Railroad Commission of Iowa fixing a rate for the transportation of goods from Beloit, in the State of Iowa, to Sioux City, in the same State, a part of the transportation, a little less than one-half, in all, of the total distance, being through the State of South Dakota. The railway line crossed the South Dakota boundary four times. It was held, on the authority of the Lehigh Valley case, that this transportation was not interstate commerce, and that the provision of the Iowa statute, under which the schedule of rates sought to be enforced was adopted (Section 1 of Chapter 28 of the Acts of the Twenty-second General Assembly), to the effect that the regulations of that chapter, fixing the maximum rates of freight, should be applicable whether the transportation "shall be wholly within this State or partly within this State and an adjoining State or States" was *not* unconstitutional.

Seawell vs. Kansas City, etc., Railway involved the right of a shipper to recover a penalty provided for under the Revised Statutes of Missouri, for receiving a greater compensation for a short haul than for a long haul. The transportation in question was from Carbon Center, in the State of Missouri, to Kansas City, in the State of Missouri, but four-fifths of it was in the State of Kansas. On the authority of the Lehigh Valley case the Supreme Court of Missouri held that this transportation was not interstate commerce, and that the penalty was recoverable.

State ex rel. R. R. Commissioners vs. W. U. Tel. Company is of the greatest interest in connection with the case at bar. It involved the power of the Railroad Commission of North Carolina to fix rates for the transmission of telegraph messages from points along the Norfolk and Southern Railroad, in the State of North Carolina, to other points in the same State, it appearing, however, that in the transmission of all such messages the "shortest and only route" used by the defendant traversed about two hundred and sixty-nine miles in Virginia, and required messages to be sent by way of Norfolk. *On the authority of the Lehigh Valley case the Supreme Court of North Carolina held that such messages were not interstate commerce, and were subject to regulation by the Railroad Commissioners of the State.*

The Court said:

> "A more serious question, however, is presented by the ruling of the Court upon the third conclusion of the Commission, which is as follows: 'That telegraphic messages transmitted by defendant over its said line from Elizabeth City or Edenton, or other points in North Carolina, to points in said State, do not constitute commerce between States, although traversing another State in the route, and are subject to the rate prescribed by the Commission.' It appears from the findings of fact that the shortest and only route over the wire of the defendant, by which messages can be transmitted to many points in this State, necessarily 'traverses,' in part, the State of Virginia and thence back into North Carolina; and it is insisted that such messages so transmitted are interstate commerce, and therefore not subject to the tariff regulation of the Commission.
>
> "It is not denied that the offices of the defendant along the line of the Norfolk and Southern Railroad Company, except those at

Edenton and Elizabeth City, receive commercial messages for transmission, in the manner described, to various points in North Carolina; and it is plain that such business does not relate to the intercourse of the citizens of this State with those of some other State. * * * *It must be manifest, therefore, that this business is without a single feature of interstate commerce, unless it can be found in the fact that, in the transmission of a message [illegible] traverse a part of the defendant's ou[illegible] the State of Virginia.* We have been [illegible]d to several cases in which it has been h[illegible], in respect to the continuous carriage of freight by a railroad company under such circumstances, that a State Commission had no power to prescribe rates, and also that a State had no right to levy a tax upon the gross receipts, even as to that part derived from the transportation within its territory. (State vs. Chicago Railroad Co., 40 Minn., 267; Sternberger vs. Railroad, 29 S. C., 510; North Carolina Cotton Exchange vs. Cincinnati, N. O. & T. P. Railroad, 2 Interstate Commerce Reports, 386.)

"Without attempting to discuss these cases, and to distinguish them in some particulars from ours, it is sufficient to say that, if they are not distinctly overruled, their principle is certainly in conflict with the reasoning of the opinion of the Supreme Court of the United States (Fuller, C. J.) in Lehigh Valley Railroad Co. vs. Pennsylvania, 145 U. S., 192.)"

Hanley vs. Kansas City Southern Railway.

In Hanley vs. Kansas City Southern Railway Company, 187 U. S., 617 (1902), the Lehigh Valley case was explained, the doctrine of that case confined within its proper limits, the foregoing decisions of the State Courts extending the doctrine of the Lehigh Valley case expressly disapproved, and

the true rule of law applicable to transportation or transmission of the character involved in the case at bar recognized and applied. It is the belief of counsel for plaintiff-in-error, as it was the belief of the two dissenting justices in the Supreme Court of Appeals of Virginia, that the Hanley case is conclusive of the present litigation and that no distinction between them is possible, except the distinction, which certainly does not assist the defendant-in-error, that in the case at bar the message was *relayed* in the foreign State, while in the Hanley case the transportation was continuous.

The Hanley case involved the right of the Railroad Commission of the State of Arkansas to fix and enforce rates covering the transportation of goods on a through bill of lading from Forth Smith, Ark., to Grannis, *Ark.* (not Grannis, *Kansas*, as would appear from a misprint in the official syllabus in 187 U. S.), over the lines of the Kansas City Southern Railway, the complainant below in that case, by way of Spiro in the Indian Territory, a total distance of one hundred and sixteen miles, of which fifty-two were in Arkansas and sixty-four in the Indian Territory; there having been no transshipment in the Territory, and no breaking of bulk. The case came to this Court on appeal from a decree of the Circuit Court of the Eastern District of Arkansas, overruling a demurrer to a complaint by the railway company against the Railroad Commissioners of the State, seeking to enjoin them from fixing and enforcing rates covering the transportation referred to. It was held that the transportation in question was interstate commerce, and that it was under the regulation of Congress and free from interference by the State; and that the bill for injunction stated a cause of action for equitable relief, and that the decree of the Circuit Court should be affirmed.

Mr. Justice HOLMES, writing the opinion of this Court, after premising that the power of Congress over commerce between Arkansas and the Indian Territory is not less than its power over commerce among the States, summed up the situation in a few incisive words:

> "*The transportation of these goods certainly went outside of Arkansas,* and we are of opinion that in its aspect of commerce it was not confined within the State. *Suppose that the Indian Territory were a State and should try to regulate such traffic, what would stop it? Certainly not the fiction that the commerce was confined to Arkansas.* If it could not interfere the only reason would be that this was commerce among the States. But if this commerce would have that character as against the State supposed to have been formed out of the Indian Territory, it would have it equally as against the State of Arkansas. If one could not regulate it the other could not."

Continuing he says:

> "No one contends that the regulation could be split up according to the jurisdiction of State or Territory over the track, or that both State and Territory may regulate the whole rate. There can be but one rate, fixed by one authority, whether that authority be Arkansas or Congress. Wabash, St. Louis & Pacific Railway Co. vs. Illinois, 118 U. S., 557; Covington & Cincinnati Bridge Co. vs. Kentucky, 154 U. S., 204; Hall vs. De Cuir, 95 U. S., 485. But it would be more logical to allow a division according to the jurisdiction over the track than to declare that the subject for regulation is indivisible, yet that the indivisibility does not depend upon the commerce being under the authority of Congress, but upon a fiction which attributes it wholly to Arkansas, although that fiction is quite beyond the power of Arkansas to enforce.
>
> "It is decided that navigation on the high

seas between ports of the same State is subject to regulation by Congress, Lord vs. Steamship Co., 102 U. S., 541, and is not subject to regulation by the State, Pacific Coast Steamship Co. vs. Railroad Commissioners, 9 Sawyer, 253, and although it is argued that these decisions are not conclusive, the reason given by Mr. Justice Field for his decision in the last cited case disposes equally of the case at bar. 'To bring the transportation within the control of the State, as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the State.' 9 Sawyer, 258. Decisions in point are State vs. Chicago, St. Paul, Minneapolis & Omaha Railway Co., 40 Minnesota, 267; Sternberger vs. Cape Fear & Yadkin Valley Railroad Co., 29 So. Car., 510. See also Milk Producers' Protective Association vs. Delaware, Lackawanna & Western Railroad Co., 7 Interstate Commerce Rep., 92, 160, 161.

"There are some later State decisions contrary to those last cited. Campbell vs. Chicago, Milwaukee & St. Paul Railway Co., 86 Iowa, 587; Seawell vs. Kansas City, Ft. Scott & Memphis Railroad Co., 119 Missouri, 222; Railroad Commissioners vs. Western Union Telegraph Co., 113 No. Car., 213. But these decisions were made simply out of deference to conclusions drawn from Lehigh Valley Railroad Co. vs. Pennsylvania, 145 U. S., 192, and we are of opinion that they carry their conclusions too far. That was the case of a tax and was distinguished expressly from an attempt by a State directly to regulate the transportation while outside its borders. 145 U. S., 204."

No Distinction Between the Transportation in the Hanley Case and the Transmission in the Case at Bar.

It is impossible to conceive of any valid distinc-

tion between the Hanley case and the present one except the distinction already adverted to, and on which certainly the defendant-in-error does not rely; the distinction, namely, that the transportation in the Hanley case was continuous, while in the case at bar there was the "relaying" of the message in the foreign State—the telegraphic equivalent of a breaking of bulk.

In both cases the subject under consideration was commerce.

In both cases the question was whether or not it was subject to regulation by a State.

In both cases the commerce had its origin and destination in the same State.

In both cases the subject of commerce necessarily passed, in transit, out of the physical and territorial jurisdiction and control of the State of its origin and destination, and into that of a foreign State.

In both cases it was the State of origin and destination which sought to regulate the commerce.

The only conceivable distinctions between the cases (apart from that already adverted to) are (1) that the Hanley case involved Arkansas and the Indian Territory, while the case at bar involves Virginia and West Virginia; and (2) that the Hanley case involved the carriage of goods, while the case at bar involves the transmission of a message.

But in deciding the Hanley case it was clearly present to the minds of the Court that the result there reached, whatever it might be, must be applicable to the transmission of messages as well as to the transportation of freight. **This is certain from the fact that the Court expressly disapproves the decision of the Supreme Court of North Carolina in Railroad Commissioners vs. W. U.**

Tel. Co. (supra), holding that the transmission of messages in such a case as the case at bar was within the doctrine of Lehigh Valley vs. Pennsylvania, and, as such, not interstate commerce.

Of the five justices of the Supreme Court of Virginia, who participated in the decision of this case, two dissented from the judgment of the Court. Judge CARDWELL, with whom Judge KEITH concurred, handed down a dissenting opinion which concluded as follows:

> "I am of opinion that upon this state of facts this Court is bound by the decision of the Supreme Court of the United States in Hanley vs. Kansas City, etc., Co., *supra*, to hold that the statute, in so far as it authorizes the imposition of the penalty in such a case, transcends the police power of the State and violates Sec. 8, Art. 1, of the Constitution of the United States" (Record, p. 19).

But perhaps the most significant proof of the entire absence of any ground for a satisfactory distinction between this case and that of Hanley, is the attitude of the majority of the Supreme Court of Virginia, as expressed in their opinion:

> "The case in judgment, in our opinion, involves the exercise of an important police power of the State, a power which ought not to be surrendered and which we are unwilling to surrender in the absence of a direct and authoritative declaration on the part of the Supreme Court of the United States that it is violative of the Federal Constitution (Record, p. 20)"

The plaintiff-in-error respectfully asks this Court for the direct and authoritative declaration which the Supreme Court of Appeals of Virginia demands.

II.

A STATE STATUTE REGULATING THE TRANSMISSION OF TELEGRAMS IS INVALID, IN ITS APPLICATION TO INTERSTATE MESSAGES, UNLESS IT IS TO BE SUPPORTED UNDER THE EXCEPTIONAL DOCTRINE OF W. U. TEL. CO. VS. JAMES; AND THE STATUTE IN QUESTION, IN ITS APPLICATION TO THE TRANSMISSION OF THIS MESSAGE, CANNOT BE SO SUPPORTED, BECAUSE THERE WAS NO DEFAULT WITHIN THE STATE OF VIRGINIA.

It will not be disputed that, *prima facie*, a State statute requiring, under a penalty, that telegrams shall be transmitted and delivered, and prescribing the order in which the transmission and delivery shall take place, is an attempt to regulate commerce. In so far as such a statute assumes to apply to an interstate message, it assumes to regulate interstate commerce; and it requires no elaborate reference to authorities to establish that such an attempt at regulation of interstate commerce, by a State, is *prima facie* invalid.

Hall vs. De Cuir, 95 U. S., 485.
W. U. Tel. Co. vs. Pendleton, 122 U. S., 347.

In Hall vs. De Cuir a statute of Louisiana forbade all carriers of passengers to refuse admission to their vehicles to any person of good character,

etc., especially forbidding any discrimination on account of color or race. Under that statute the plaintiff, a colored woman, journeying from New Orleans to Hermitage, both in the State of Louisiana, insisted on admission to a steamboat cabin reserved for white persons. The question was whether the statute of Louisiana could constitutionally apply to the transportation of the plaintiff between the points named, both in Louisiana; the fact being that the vessel on which she was a passenger was engaged in the transportation of passengers and freight along the Mississippi River between New Orleans, in the State of Louisiana, and Vicksburg, in the State of Mississippi, touching at the intermediate landings both within and without Louisiana, as occasion required. This Court held, reversing the Supreme Court of Louisiana, that the Louisiana act, in so far as it had been held by the Supreme Court of that State to apply to vessels engaged in interstate commerce, *even while those vessels were proceeding between two given points in the same State*, was unconstitutional, as an attempted interference, by the State, with the power of regulation which, as to such traffic, was vested exclusively in Congress:

> "This power of regulation may be exercised without legislation as well as with it. By refraining from action, Congress, in effect, adopts as its own regulations those which the common law, or the civil law where that prevails, has provided for the government of such business, and those which the States, in the regulation of their domestic concerns, have established affecting commerce, but not regulating it within the meaning of the Constitution. In fact, congressional legislation is only necessary to cure defects in existing laws, as they are discovered, and to adapt such laws to new developments of trade. As was said by Mr. Justice FIELD, speaking for the Court in Wel-

ton vs. The State of Missouri, 91 U. S., 282, 'inaction [by Congress] * * * is equivalent to a declaration that interstate commerce shall remain free and untrammelled.'"

The following language of the Court, which has been widely quoted, is also significant:

> "If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate."

W. U. Tel. Co. vs. Pendleton.

In the Pendleton case (122 U. S., 347) it appeared that a statute of Indiana (Revised Statutes of Ind., 1881, Sections 4176, 4178) required telegraph companies to deliver dispatches by messenger to the persons to whom the same were addressed, or to their agents, provided they resided within one mile of the telegraphic station, or within the city or town in which such station was, under a penalty of one hundred dollars. The plaintiff below in that case sued to recover the above penalty for the failure of the telegraph company, the de-

fendant below, to deliver at Ottumwa, in Iowa, a message received by it in Indiana for transmission to that place. The Supreme Court of Indiana construed the statute above referred to as applying to the delivery of the message then in question at Ottumwa, and affirmed a judgment in favor of the plaintiff for the amount of the penalty. On writ of error to this Court, the judgment was reversed. It was held that the statutes in question were in conflict with the commerce clause of the United States Constitution "in so far as they attempt to regulate the delivery of such dispatches at places situated in other States;" that **"the authority of Congress over the subject of commerce by telegraph with foreign countries or among the States being supreme, no State can impose an impediment to its freedom, by attempting to regulate the delivery in other States of messages received within its own borders;"** and that the police power of the State did not extend "to the regulation of the delivery at points without the State" of messages received within, but only to the making of "all necessary provisions in respect of the buildings, poles and wires of telegraph companies **within its jurisdiction,** which the comfort and convenience of the community may require."

Mr. Justice FIELD wrote the opinion of the Court:

> "The object of vesting the power to regulate commerce in Congress was to secure, with reference to its subjects, uniform regulations, where such uniformity is practicable, against conflicting State legislation. Such conflicting legislation would inevitably follow with reference to telegraphic communications between citizens of different States, if each State

was vested with power to control them beyond its own limits. The manner and order of the delivery of telegrams, as well as of their transmission, would vary according to the judgment of each State. Indiana, as seen by its law given above, has provided that communications for or from officers of justice shall take precedence, and that arrangements may be made with publishers of newspapers for the transmission of intelligence of general and public interest out of its order; but that all other messages shall be transmitted in the order in which they are received; and punishes as an offense a disregard of this rule. Her attempt, by penal statutes, to enforce delivery of such messages in other States, in conformity with this rule, could hardly fail to lead to collision with their statutes. Other States might well direct that telegrams on many other subjects should have precedence in delivery within their limits over some of these, such as telegrams for the attendance of physicians and surgeons in case of sudden sickness or accident, telegrams calling for aid in cases of fire or other calamity, and telegrams respecting the sickness or death of relatives.

"Indiana also requires telegrams to be delivered by messengers to the persons to whom they are addressed, if they reside within one mile of the telegraph station, or within the city and town in which such station is; and the requirement applies, according to the decision of its Supreme Court in this case, when the delivery is to be made in another State. Other States might conclude that the delivery by messenger to a person living in a town or city being many miles in extent was an unwise burden, and require the duty within less limits; but if the law of one State can prescribe the order and manner of delivery in another State, the receiver of the message would often find himself incurring a penalty because of conflicting laws, both of which he could not obey. Conflict and confusion would only follow the

> attempted exercise of such a power. We are clear that it does not exist in any State."

It is to be observed that the Virginia statute under consideration in the case at bar is extremely similar to the Indiana statute considered in W. U. Tel. Co. vs. Pendleton. Like the Indiana statute it contains a provision that:

> "Nothing herein shall prevent any such company from giving preference to dispatches on official business, from or to officers of the United States, or the State of Virginia, or from making arrangements with proprietors or publishers of newspapers, for the transmission to them, for publication, of intelligence of general and public interest, out of its regular order."

Every word said by Mr. Justice Field applies as well to the Virginia statute as to that of Indiana. There is nothing in the law of West Virginia which authorizes a telegraph company to prefer a dispatch, sent on the official business of the State of Virginia, to a prior dispatch received in any telegraph office in West Virginia; nor is there anything in the law of West Virginia which authorizes the preference of messages addressed to newspapers. What was the duty of this plaintiff in error, on the receipt of the message in suit at Bluefield in the State of West Virginia, with reference to its further transmission? If the Virginia statute applied, as the Supreme Court of Virginia has held that it did apply, to the conduct of the agents of the telegraph company at the Bluefield, West Virginia, office, what was the duty of those agents in respect of this message? Could it have been postponed for the sake of giving a preference to a later message affecting the official business of the State of Virginia? Was it not within the police power of the State of West Virginia to prescribe the order in which messages received at Bluefield should be sent

from Bluefield to Pocahontas, if it was within the power of the State of Virginia to prescribe the order in which messages should be sent from Danville to Bluefield? Which law was it the duty of the Bluefield operators to obey?

W. U. Tel. Co. vs. James.

In W. U. Tel. Co. vs. James, 162 U. S., 650, the exceptional rule of law under which the majority of the Supreme Court of Appeals of Virginia has undertaken to support the judgment of the Corporation Court of Danville in the present case was first enunciated and defined.

That case was the converse of the Pendleton case.

In the Pendleton case the message orginated in Indiana, and was sent to Iowa, and it was for a default in the State of Iowa that the plaintiff sought to recover the Indiana penalty in an Indiana Court. In the James case, on the contrary, the message orginated in Alabama, and was destined to a place in Georgia; it was properly transmitted to the point of destination, within the State of Georgia, and there was a negligent failure to deliver there; and the plaintiff sued in a Georgia Court for the penalty provided for by the laws of Georgia, for the default in that State.

This Court sustained the Georgia statute, in its application to the message then sued on, on the ground that the default which was then the subject of complaint was a default which occurred within the jurisdiction of the State of Georgia, and not in any foreign State. It said:

> "We see no reason to fear any weakening of the protection of the constitutional provision as to commerce among the several States by holding that in regard to such a message as the one in question, although it comes from a

> place without the State, *it is yet under the jurisdiction of the State where it is to be delivered (after its arrival therein at the place of delivery)*, at least so far as legislation of the State tends to enforce the performance of duty owed by the company under the general law."

And again:

> "Nor is the statute open to the same objections that were regarded as fatal in the Pendleton case, 122 U. S., 347. **No attempt is here made to enforce the provisions of the State statute beyond the limits of the State, and no other State could by legislative enactment affect in any degree the duty of the company in relation to the delivery of messages within the limits of the State of Georgia.** No confusion therefore could be expected in carrying out within the limits of that State the provisions of the statute."

It is to be observed that Mr. Justice White and Mr. Justice Shiras dissented from the opinion of the majority in the James case, seeing no sound distinction between that case and the Pendleton case.

In the Case at Bar there was no Default in Virginia.

But whether or not the difference between the facts of the James case and the facts of the Pendleton case justified the difference in the result reached—whether or not the distinction made between those cases by the majority of the Court in the James case was sound on principle, it is perfectly clear, at least, what that distinction was. Reading W. U. Tel. Co. vs. Pendleton and W. U. Tel. Co. vs. James together, and giving each case

its full value, we arrive at the following rule of law and exception:

> RULE. A State statute regulating the transmission of telegrams is invalid in so far as it applies, or assume to apply, to the transmission or delivery of messages to or from other States;
>
> EXCEPTION. But such a statute may be valid as applied to a default in the delivery of a message after its arrival at its place of delivery within the State where the statute exists, even though such message originated in a foreign State.

The Supreme Court of Appeals of Virginia has sought to sustain this judgment under the doctrine of W. U. Tel. Co. vs. James (Record, p. 20); and it is believed that there is no contention on the part of defendant-in-error that it is to be supported on any other principle.

But the essential feature, which was present in the James case, and which in the minds of the majority of the Court distinguished it from that of Pendleton, was that the default relied on by the plaintiff occurred *within the limits of the State of Georgia:*

> "Under the jurisdiction of the State where it" (the message) "is to be delivered (after its arrival therein at the place of delivery)—"
>
> Opinion of the Court, page 661.

And again:

> "No attempt is here made to enforce the provisions of the State statute beyond the limits of the State."
>
> *Ibid.*, page 662.

If the message in the James case, which originated in Alabama, had never been sent out of Alabama or into the jurisdiction of the State of Georgia, can it be doubted for a moment that this

Court would have refused to allow the Georgia statute to apply? To apply the statute, in that case, would have been to permit the State of Georgia to regulate the acts of a telegraph company's agents in the State of Alabama, which is absurd.

In the case at bar there was no default within the State of Virginia. This appears clearly from the Certificate of Facts (Record, p. 13). The message was sent as promptly as practicable, faithfully, impartially, and in the order of its receipt by the company, from Danville, Va., to Richmond, Va., and thence to Bluefield, in the State of West Virginia. It was received at Bluefield in the State of West Virginia; and thereafter it does not appear what became of it. Certainly there is no suggestion, nor is it possible to draw any inference, that it ever came back again, at any time, within the State of Virginia or under the jurisdiction thereof. *It affirmatively appears that it was never received at Pocahontas.* Whatever was done with the message—for whatever reason it failed in transmission, as to which the record is silent—**the fault, if any, was at Bluefield, and was not within the State of Virginia.**

There is nothing in the record from which the Corporation Court, the Supreme Court of Virginia, or this Court could infer that at any time or at any place within the geographical boundaries of Virginia and the territorial jurisdiction of that State, this plaintiff in error or any of its agents or servants was guilty of a violation of the statute now under consideration with respect to this message or failed in any duty imposed thereby. The plaintiff in error, the defendant below, did fail in the duty which the statute sought to impose; but the failure was a failure on the part of the

defendant to forward the message from Bluefield, and that was not within the jurisdiction of the State of Virginia, and the James case does not authorize the plaintiff to recover a penalty for the violation, at Bluefield, of a Virginia penal law.

In favor of this plaintiff, an informer, who has sustained no actual damage and whose recovery is, substantially, a fine, this Court should not, it is respectfully submitted, be alert to sustain, by the fiction adopted for another purpose in the Lehigh Valley case, this judgment of the Supreme Court of Virginia.

III.

THE JUDGMENT OF THE SUPREME COURT OF APPEALS OF VIRGINIA SHOULD BE REVERSED.

Respectfully,

JOHN F. DILLON,
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Attorneys for Plaintiff in Error.

Supreme Court of the United States.

No. 119.—October Term, 1906.

The Western Union Telegraph Company, Plaintiff in Error, vs. Charles E. Hughes. } In error to the Supreme Court of Appeals of the State of Virginia.

[December 17, 1906.]

Mr. Justice White delivered the opinion of the Court.

By statutes of the State of Virginia a liability to forfeit the sum of one hundred dollars was imposed upon a telegraph company for an omission to promptly transmit and deliver telegrams received by it. (Code of Va. 1887, secs. 1291, 1292.) On November 2, 1903, Hughes, the defendant in error, handed to the Western Union Telegraph Company, at its office in Danville, Virginia, a message to be transmitted by wire to Pocahontas, Virginia, and there delivered to the addressee. In regular course such message would have gone by way of Bluefield, West Virginia. It reached that point, but was not sent further. For failure to make delivery Hughes sued the telegraph company in the Corporation Court of the city of Danville to recover the statutory penalty, and obtained a judgment. Error was prosecuted to the Supreme Court of Appeals of Virginia, upon the contention that the transmission of the message in question was interstate commerce and not subject to the statutory regulations of Virginia, heretofore referred to. The appellate court, however, held (104 Va. 240) that the case was ruled by a prior decision, (*Western Union Telegraph Co.* v. *Reynolds*, 100 Va. 459,) and that such decision had not been overruled by the decision of this court in *Henley* v. *Kansas City So. R. Co.*, (187 U. S. 617,) and being of opinion, as recited on its journal, "that the writ of error was improvidently awarded," and that it had "no jurisdiction to entertain the same," dismissed the writ of error.

Treating the order of dismissal as a final judgment, we are now asked on this writ of error to reverse the ruling of the Supreme Court of Appeals of Virginia. This, however, we cannot do. It is immaterial that the Supreme Court of Appeals was vested by the State constitution with appellate jurisdiction in all cases involving the constitutionality of a law as being repugnant to the constitution of Virginia or of the United States, or that in the opinion delivered by the court it discussed the Federal question and declared it to be without merit. The fact is undoubted that the writ of

error was dismissed solely and expressly because of a want of jurisdiction, and the effect of the formal entry, adjudging that the court was without jurisdiction to pass upon the questions presented by the writ of error, can not be different from what it would have been had the court not given expression to its views in a written opinion. The necessary result of the ruling that the court had not jurisdiction of the writ of error was to determine that the trial court was the final court where the questions presented by the writ could be decided; and, hence, the writ of error should have been directed to that court. (*Missouri, K. & T. Ry.* v. *Elliott*, 184 U. S. 530, 539.)

Writ of error dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.